

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

United States of America,

Case No.: 2:14-cr-00228-JAD-CWH

Plaintiff

V.

Charles Edward Cooper, Jr.,

Defendant

**Order Denying Emergency Motion for
Sentence Reduction under
18 U.S.C. 3582(c)(1)(A)(i)**

[ECF No. 264]

8 Charles Edward Cooper, Jr. has served roughly six years of his ten-year federal prison
9 sentence for a felon-in-possession-of-a-firearm conviction.¹ He now moves for a compassionate
10 release, arguing that his health conditions put him at greater risk of complications should the
11 COVID-19 virus infiltrate FCI Safford where he is serving his sentence.² Though I am deeply
12 sympathetic to Cooper's situation, I deny his motion because he has not exhausted the Bureau of
13 Prisons' (BOP) process for seeking this relief and the record fails to establish extraordinary and
14 compelling reasons for his early release.

Background

16 Cooper is serving a ten-year sentence for being a felon in possession of a firearm in
17 violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).³ The evidence at his jury trial established that
18 Cooper's firearm possession came to the attention of law enforcement when his girlfriend went
19 to the hospital after he beat her up. The Ninth Circuit affirmed his judgment of conviction.⁴

¹ ECF No. 225 (judgment).

|² ECF No. 111.

23||³ ECF No. 225.

4 ECF No. 255.

1 Cooper had an extensive and violent criminal history before this conviction, giving him a
 2 criminal history score of 21 and putting him well into the highest criminal history category. As I
 3 summarized when imposing the statutory maximum sentence:

4 I think it's impossible to overlook Mr. Cooper's extensive, lengthy,
 5 and violent criminal history from the age of 16. This is his ninth
 6 felony conviction; he has another 17 misdemeanor convictions. He
 7 has a rich history of violence against women and children and drug
 8 trafficking and various parole violations, probation revocations,
 bench warrants, and contempt findings revealing a total lack of
 regard for the law or any remorse or acceptance of responsibility
 for any of that history. He has empirically established a likelihood
 of recidivism and a danger to the community.

9 And, during recorded conversations at jail, he was flagrantly trying
 10 to get [his girlfriend] to take the rap for this conduct, which I think
 11 further demonstrates a total disrespect or disregard for the law and
 12 the criminal justice system and, even more, a lack of remorse.⁵

13 53-year-old Cooper is currently housed at the BOP's Federal Correctional Institution in
 14 Safford, Arizona and has a projected release date of January 7, 2023.⁶ He claims (without
 15 presenting medical records to corroborate that claim) that he suffers from asthma and chronic
 16 sleep apnea and is awaiting a CPAP machine.⁷ He states that he "has requested through
 17 electronically written requests to his Unit Team and the Warden at F.C.I. Safford a
 18 compassionate release due to his compromised immune system and the unforeseen [sic] Covid-19
 19 pandemic, to no avail."⁸ Though he does not attach a copy of those requests, the government
 20 states that it has confirmed that Cooper submitted his request for either home confinement or

21⁵ ECF No. 229 at 69 (transcript of sentencing hearing).

22⁶ <https://www.bop.gov/inmateloc/> (search for Register Number 49219-048, last visited
 4/28/2020).

23⁷ ECF No. 264 at 1.

⁸ *Id.* at 2.

1 compassionate release on March 31, 2020; the request for home detention was denied, and the
2 warden has not yet acted on the request for home confinement.⁹ Cooper asks to be released to
3 live with his “ailing mother who recently had a stroke” and broke her ribs.¹⁰ He claims that he is
4 unable to provide self-care at Safford because he can’t socially distance.¹¹ And he states that
5 “there are at least two confirmed cases of Covid-19 in the town of Safford, AZ. It is only a
6 matter of time before it is introduced into” the prison.¹²

The government opposes Cooper's pro se motion, arguing that his failure to comply with the statutory exhaustion requirements is fatal to his request and, regardless, he has not shown extraordinary and compelling reasons for compassionate release.¹³ Cooper's counsel filed a reply, asking the court to dispense with the administrative-exhaustion requirement due to the urgency of the situation and arguing that failure to release Cooper is cruel and unusual punishment.¹⁴

Discussion

14 A sentencing court's ability to modify or reduce a sentence once imposed is seriously
15 limited.¹⁵ The compassionate-release provision of 18 U.S.C. § 3582(c)(1)(A)(i), as amended by
16 the First Step Act of 2018,¹⁶ is an exception to this limitation. It allows the sentencing judge to

¹⁸ ¶⁹ ECF No. 266 at n.1.

¹⁹||¹⁰ ECF No. 264 at 2.

20 | 11 Id.

||¹² *Id.* at 3.

21 | ¹³ ECF No. 266.

22 | ¹⁴ ECF No. 267.

¹⁵ See *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003) (exploring Federal Rules of Criminal Procedure 35 and 36); 18 U.S.C. § 3582(c).

¹⁶ The First Step Act of 2018, § 603(b), Pub. L. 115-391, 132 Stat. 5194, 5239 (Dec. 21, 2018).

1 reduce a sentence based on “extraordinary and compelling reasons” after the defendant has failed
 2 to get the BOP to bring such a motion on his behalf.¹⁷ The court must consider the factors in 18
 3 U.S.C. § 3553(a) “to the extent that they are applicable,” and any sentence reduction must be
 4 “consistent with applicable policy statements issued by the Sentencing Commission.”¹⁸

5

6 **A. Cooper’s failure to exhaust the administrative process for his release request
 precludes relief.**

7 The court may entertain an inmate’s request for compassionate release under 18 U.S.C. §
 8 3582(c)(1)(A)(i) only (1) “after [he] has fully exhausted all administrative rights to appeal a
 9 failure of the Bureau of Prisons to bring a motion” on his behalf or (2) after “the lapse of 30 days
 10 from the receipt of such a request by the warden of the defendant’s facility, whichever is
 11 earlier.”¹⁹ Cooper represents that he submitted his compassionate-release request to the
 12 warden.²⁰ The government has confirmed that Cooper did so on March 31, 2020, and that his
 13 request for home detention was denied but the warden has not acted on his request for home
 14 confinement.²¹ Cooper thus has not shown that he has exhausted the compassionate-release
 15 process at the BOP, and the 30-day period has not yet passed.

16 Cooper’s counsel argues in his reply that the court should dispense with this
 17 administrative-exhaustion requirement due to the urgency of this pandemic.²² In addressing the
 18 flood of emergency release motions that the pandemic has prompted, courts are split on the
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20¹⁷ 18 U.S.C. § 3582(c)(1)(A)(i).

21¹⁸ *Id.*

22¹⁹ *Id.*

23²⁰ ECF No. 264 at 2.

²¹ ECF No. 266 at n.1.

²² ECF No. 267 at 5.

1 question of whether the exhaustion requirement can be disregarded.²³ After evaluating the
 2 growing body of decisions, I side with those who have concluded that the failure to satisfy this
 3 requirement is “a glaring roadblock foreclosing compassionate release . . .”²⁴

4 Section 3582(c) states that “[t]he court *may not* modify a term of imprisonment once it
 5 has been imposed,” except under specified conditions.²⁵ For a motion brought under
 6 § 3582(c)(1)(A)(i), those specified conditions include the exhaustion of administrative remedies
 7 or the BOP’s inaction for 30 days.²⁶ Thus, the exhaustion requirement is imposed by the express
 8 language of the statute itself; it is not judicially created. As the United States Supreme Court
 9 explained in *Ross v. Blake*, while “judge-made exhaustion doctrines . . . remain amendable to
 10 judge-made exceptions[,] . . . a statutory exhaustion provision stands on different footing. There
 11 Congress sets the rules—and courts have a role in creating exceptions only if Congress wants
 12 them to.”²⁷ Courts may not carve out exceptions that Congress did not provide, even “special
 13 circumstances” ones, because “mandatory exhaustion statutes . . . establish mandatory
 14 exhaustion regimes, foreclosing judicial discretion.”²⁸

15 Because Congress prescribed no special-circumstances exception to § 3582(c)(1)(A)(i)’s
 16 exhaustion requirement, *Ross* dictates that this court lacks the power to create one.²⁹ Any
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²³ See, e.g., *U.S. v. Otero*, 2020 WL 1912216, *4 (S.D. Cal. Apr. 20, 2020) (collecting cases).

²⁴ *U.S. v. Raia*, 954 F.3d 594 (3d Cir., Apr. 2, 2020) (holding that failure to comply with § 3582(c)(1)(A)’s exhaustion requirement barred relief).

²⁵ 18 U.S.C. § 3582(c) (emphasis added).

²⁶ 18 U.S.C. § 3582(c)(1)(A).

²⁷ *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016).

²⁸ *Id.* at 1856–58.

²⁹ See, e.g., *Harris v. Harris*, 935 F.3d 670, 676 (9th Cir. 2019) (noting that statutory language must be construed “strictly and narrowly”).

1 argument for creating such an exception is further weakened by the fact that this statutory
 2 provision is itself a special-circumstances exception to the court's inability to modify a sentence.
 3 Plus, it has its own futility exception "baked into its text,"³⁰ as it permits an inmate to file his
 4 motion after 30 days if the warden hasn't acted.³¹ Given Congress's decision to mandate
 5 exhaustion and specify this singular, express exception, this court cannot apply an unwritten
 6 special-circumstances one to excuse Cooper's failure to exhaust.³² Because Cooper did not fully
 7 exhaust the administrative process or wait 30 days before filing this motion, his motion must be
 8 denied for failure to exhaust.

9

10 **B. The record does not contain extraordinary and compelling reasons for
 Cooper's early release.**

11 Even if Cooper had properly exhausted the administrative process before filing this
 12 motion, I would deny it for the separate and independent reason that the record does not
 13 demonstrate that his compassionate release is warranted. Although the statute does not define
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15 ³⁰ *Ross*, 136 S. Ct. at 1862.

16 ³¹ 18 U.S.C. 3582(c)(1)(A).

17 ³² See *Ross*. at 1856, 1862 (concluding that the Prison Litigation Reform Act's "mandatory
 language means a court may not excuse a failure to exhaust, even to take [special] circumstances
 into account"). There are also sound policy reasons to require an inmate to present his COVID-
 19 compassionate-release request first to the BOP. The Attorney General has empowered the
 18 BOP to transfer "suitable candidates" with COVID-19 risk factors to home confinement.
https://www.bop.gov/resources/news/pdfs/20200405_covid-19_home_confinement.pdf. The
 19 exhaustion doctrine recognizes "that agencies, not the courts, ought to have primary
 responsibility for the programs that Congress has charged them to administer" and allows the
 20 agencies to apply their "special expertise." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992),
superseded by statute on other grounds. "Because defendant is in BOP custody, the BOP is in a
 21 better position to initially determine [his] medical needs, the specific risk of COVID-19 to [him]
 and the inmates generally at" his facility, "the risk to the public if [he] is released and whether
 22 [his] release plan is adequate." *U.S. v. Read-Forbes*, 2020 WL 1888856, *4 (D. Kan., Apr. 16,
 23 2020). These concerns are particularly salient here because Cooper's medical conditions are
 unverified and FCI Safford has no reported COVID-19 cases.

1 “extraordinary and compelling circumstances,” the U.S. Sentencing Commission has identified
 2 four categories of situations that may qualify: serious medical conditions, advanced age, family
 3 circumstances, and a catch-all “other reasons.”³³ Cooper contends that he falls into the medical-
 4 condition category because he is a 53-year-old African-American man with asthma and chronic
 5 sleep apnea, putting him at greater risk should he contract COVID-19.³⁴ The Sentencing
 6 Commission finds extraordinary and compelling reasons under the medical category when the
 7 defendant has a physical, mental, functional, or cognitive impairment “that substantially
 8 diminishes” his ability “to provide self-care within the environment of a correctional facility and
 9 from which . . . he is not expected to recover.”³⁵

10 Cooper has not demonstrated that his medical situation presents extraordinary and
 11 compelling circumstances for compassionate release because he offers no records to support
 12 these diagnoses, which must have been made after his 2016 sentencing because his presentence
 13 investigation report reflects that he was in good health with no known medical conditions.
 14 Even if Cooper has these conditions, the notion that he would be better protected from the virus
 15 at his elderly mother’s home in Nevada, where there have been nearly 5,000 positive-test cases,³⁶
 16 than at FCI Stafford is speculation. Although the COVID-19 pandemic is undeniably grave and
 17 its impacts on every aspect of American life are unprecedented, there are no confirmed cases of
 18 the virus at FCI Stafford, as Cooper acknowledges,³⁷ and the BOP has implemented a detailed
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21 ³³ U.S.S.G. 1B1.13, application note 1(A).

22 ³⁴ ECF No. 264 at 1.

23 ³⁵ U.S.S.G. 1B1.13, application note 1(A).

³⁶ <https://covidtracking.com/data#state-nv>, last visited 4/29/2020.

³⁷ ECF No. 264.

1 COVID-19 response plan for federal inmates.³⁸ Thus, I cannot conclude that Cooper's health
 2 conditions, even in the face of the COVID-19 pandemic, provide extraordinary and compelling
 3 reasons for his early release.

4 A sentence reduction for Cooper is also unwarranted under the § 3553(a) factors. His
 5 10-year sentence was well justified by his extensive and violent criminal history that includes
 6 nine felony and seventeen misdemeanor convictions, violence against women and children, drug
 7 trafficking, various parole violations, probation revocations, bench warrants, and contempt
 8 findings.³⁹ I found—and maintain—that he was and remains a danger to the community based
 9 on his empirically established likelihood of recidivism, his disregard for the law and the
 10 criminal-justice system, and his lack of remorse. Cooper's history and characteristics, and the
 11 need to promote respect for the law and protect the public from Cooper's crimes all weigh
 12 heavily against shaving nearly three years off his custodial sentence.

13 Finally, Cooper has not presented a constitutional basis to grant this relief. His counsel
 14 argues in reply that, unless he's released, "he is going to be exposed to a life-threatening virus,"
 15 and that "would certainly be cruel and unusual punishment."⁴⁰ This hyperbole is based on the
 16 assertion that the protections from COVID-19 for inmates are generally insufficient and opinions
 17 about prison populations and practices generally.⁴¹ The information that the government has
 18 provided specifically about the BOP's COVID-19 plan, procedures, and practices demonstrates
 19 that the BOP is taking precautions to protect Cooper and is actively responding to COVID-19

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 22³⁸ https://www.bop.gov/coronavirus/covid19_status.jsp, last visited 4/29/2020.

23³⁹ ECF No. 229 at 69 (transcript of sentencing hearing).

⁴⁰ ECF No. 267 at 9.

⁴¹ See generally *id.*

1 challenges as they evolve. Because he has not shown deliberate indifference to his health or
2 safety,⁴² Cooper's constitutional arguments fail.

Conclusion

4 IT IS THEREFORE ORDERED that Defendant Charles E. Cooper's Emergency Motion
5 for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) [ECF No. 264] is DENIED.

6 Dated: April 29, 2020

U.S. District Judge Jennifer A. Dorsey

⁴² The Eighth Amendment imposes duties on prison officials to take reasonable measures to guarantee the safety of inmates. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). To establish a violation of these duties, a prisoner must demonstrate deliberate indifference to a serious threat to his safety or health. *Id.* at 834.